

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
COLIN HOCHSTIN CO.	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Income Tax	:	
under Article 23 of the Tax Law for the Years	:	
1978, 1979 and 1980.	:	

Petitioner, Colin Hochstin Co., 120 Broadway, New York, New York 10005, filed a petition for redetermination of a deficiency or for refund of unincorporated business income tax under Article 23 of the Tax Law for the years 1978, 1979 and 1980 (File No. 806022).

On November 30, 1988 and January 18, 1989, respectively, petitioner and the Division of Taxation waived a hearing and agreed to submit the case for determination based upon documentation submitted. After due consideration of the record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether, for purposes of New York State unincorporated business income tax, petitioner properly excluded from income refunds of New York City unincorporated business income tax.

FINDINGS OF FACT

1. On April 7, 1982, the Division of Taxation issued a Notice of Deficiency for the years 1978, 1979 and 1980 to petitioner, Colin Hochstin Co., in the amount of \$42,474.28, plus penalty and interest.

2. Petitioner is engaged in the stock brokerage business. During each year in issue, petitioner paid stock transfer tax to New York State and New York City and received a refund of State and City unincorporated business income tax equal to 50 percent of the amount of the stock transfer tax paid on securities traded for its own account. Petitioner received refunds of \$603,724.50 in 1978, \$621,086.08 in 1979 and \$554,862.92 in 1980. The refunds were equally divided between New York State and New York City. Petitioner's tax year corresponds to the calendar year.

3. In calculating its unincorporated business income under article 23 of the Tax Law, petitioner subtracted from its Federal gross income the full amount of the refunds received as shown above. Upon examination of petitioner's

returns, the Division disallowed 50 percent of the refund deduction, maintaining that, although 100 percent of stock transfer taxes taken as a deduction for Federal purposes must be added back to New York State income in determining New York State entire net income, only the State portion of the refunds received could be excluded from Federal taxable income in determining New York State entire net income. The Division took the position that the New York City portion of the unincorporated business tax refund could not be excluded in determining New York State entire net income since the applicable statute allowed an exclusion of only the State refund.

4. As a result of its audit, the Division made the following adjustments to petitioner's reported unincorporated business income:

(a) for each year at issue, petitioner's Federal gross income was increased by the amount of its New York City unincorporated business income tax refund;

(b) for 1978, a net operating loss carried forward from 1977 was disallowed. This loss was predicated in part on petitioner's exclusion of the New York City refund from its calculation of its 1977 taxable unincorporated business income.

5. On March 15, 1982, the Division issued to petitioner a Statement of Audit Changes showing the following calculations:

	<u>1978</u>	<u>1979</u>	<u>1980</u>
Reported taxable income \$552,259.00		\$ 97,826.00	(\$115,792.00)
1977 Net Operating loss disallowed		141,389.00	
NYC Stock Transfer tax refund 277,431.46		301,862.25	310,543.04
Corrected taxable income \$829,690.46		\$541,077.25	\$194,751.04
Additional tax due 11,297.62		\$ 22,412.86	\$ 8,763.80
			\$

The Statement also explained that a penalty of \$1,752.76 was imposed for late filing of the 1979 tax return.

6. On March 10, 1986, petitioner and the Division stipulated to six facts. Those facts have been adopted and substantially incorporated into this determination.

SUMMARY OF THE PARTIES' POSITIONS

7. In 1986, the applicable statute was amended to allow an exclusion for all refunds of New York State income taxes, refunds of New York City income taxes except unincorporated business taxes, but allowing refunds of New York City unincorporated business income taxes attributable to stock transfer tax paid. The amendment was applicable to all tax years commencing on and after August 1, 1977. Because of the amendment, the Division recalculated

petitioner's tax deficiency for the years in issue, subtracting the New York City refund from petitioner's Federal gross income. This review also disclosed that in its original audit the Division had overstated petitioner's 1978 Federal gross

income in the amount of \$5,000.00. The Division continued to disallow the net operating loss deduction carried forward by petitioner from 1977 to 1978. The 1977 loss was disallowed because it was based on an exclusion from income of the New York City refund, and the Division maintains that the exclusion does not apply to tax years commencing on or before July 31, 1977. Based on this review, the Division agreed to cancel the tax deficiencies asserted for the years 1979 and 1980, and it reduced the 1978 asserted deficiency to \$7,069.75 plus interest.

8. Before the 1986 amendment of the Unincorporated Business Tax Law, petitioner challenged the deficiencies on three grounds:

(a) that the Legislature has no constitutional authority to tax refunds of New York City tax;

(b) that a refund of tax is not income to the taxpayer; and

(c) that the Division's interpretation of the Tax Law confuses the stock transfer tax with the unincorporated business income tax.

9. Petitioner's position is that its original arguments apply to the 1977 tax year and justify its treatment of the New York City refund in that year, thus supporting the net operating loss carried forward to 1978. Petitioner further argues that the Legislature would have included the 1977 tax year in the amendment of 1986 had it known that some taxpayers still had an open claim for that year.

CONCLUSIONS OF LAW

A. Former section 701 of the Tax Law imposed a tax on the unincorporated business taxable income of every unincorporated business doing business wholly or partly in New York State. The Unincorporated Business Income Tax (UBT) Law was added in 1960 and repealed by chapter 69 of the Laws of 1978, effective December 31, 1982.

The starting point for determining unincorporated business taxable income is Federal gross income for the taxable year (Tax Law former § 705[a]). For Federal purposes, petitioner deducted the full amount of State and City stock transfer taxes paid, and then, because it was an accrual taxpayer, it added any tax credits or refunds it received. Tax Law former § 701(e), applicable to tax years commencing on or after August 1, 1976, provides a refund or credit against the UBT for stock transfer taxes paid by securities dealers trading for their own account. The amount of the credit is equal to 50 percent of the tax incurred. The Administrative Code of the City of New York former § S46-3.0(c) provides for an identical credit against the City UBT. Thus, in calculating its Federal gross income, petitioner deducted all stock transfer taxes paid and added back all refunds of State and City UBT received.

Petitioner was then required to make certain modifications, increasing or decreasing Federal gross income, to calculate its unincorporated business taxable income (Tax Law former § 705[b], [c]). Modifications relevant to the

stock transfer tax credit underwent a series of amendments, so that the law applicable to petitioner's 1977 tax year differs from the law applied to later years.

For its 1977 tax year, petitioner was required to increase its Federal gross income by the amount of stock transfer tax permitted as a deduction or exclusion for Federal purposes, but limited to the amount of the credit allowed under section 701(e) (Tax Law former § 705(b)(4)). Tax Law former § 705(b)(6) provided for an increase in Federal gross income of the excess of the stock transfer tax credit allowed under Tax Law § 701(e) "against the tax due under [article 23] for any taxable year over the tax due for such year computed without regard to such credit, to the extent that such excess is not included in gross income for federal income tax purposes".

Tax Law former § 705(c)(6) provided for a subtraction from Federal gross income of any refund or credit for overpayment of State or local income tax except UBT by any city of the State to the extent included in Federal gross income. In the case of a credit for stock transfer tax under Tax Law § 701(e), no adjustment was to be made for any excess credit included in Federal gross income. The net effect of these modifications, as applicable here, was to increase petitioner's Federal gross income by the total amount of stock transfer tax paid and taken as a deduction for Federal purposes, but to decrease the result by only the State portion of the UBT refunds.

B. Petitioner first argues that the City tax refunds it received were not subject to the exception of Tax Law former § 705(c)(6), because the refunds represented City stock transfer taxes rather than City unincorporated business taxes. This argument has no merit.

Tax Law former § 705(c)(6) provided for a subtraction from Federal gross income of refunds of State and local income taxes, with the exception of refunds of City unincorporated business taxes. Although the New York City refunds at issue here were calculated in relation to stock transfer taxes, they were refunds of unincorporated business income tax (Administrative Code former § S46-3.0[c]). Furthermore, if the City refunds were actually refunds of stock transfer tax, as petitioner contends, it still would not be entitled to exclude the refunds from its New York State income. Section 705(c)(6) provides for subtraction of refunds of income tax, and the stock transfer tax is not an income tax. Accordingly, under Tax Law former § 705(c)(6), applicable to petitioner's 1977 taxable year, the City UBT refund was not excludable from Federal gross income. Elimination of this exclusion from the calculation of petitioner's 1977 unincorporated business income eliminates the net operating loss for that year.

C. Chapter 65 of the Laws of 1978 amended section 705 of the Tax Law in several ways. First, section 705(b)(4) was amended to provide that 100 percent of stock transfer taxes paid and taken as a deduction for Federal purposes must be added back to Federal gross income in determining unincorporated business income. Consistent with this change, Tax Law § 705(b)(6), providing for an addition to Federal gross income of any excess refund resulting from the application of the credit for stock transfer tax if it was not included in gross income for Federal purposes, was repealed. In the same vein, Tax Law

§ 705(c)(6) was amended by deleting that portion of the paragraph which did not allow the subtraction of any excess credit included in Federal gross income. These amendments were effective April 14, 1978 and made applicable to tax years ending on or after August 1, 1977 (L 1978, ch 65 § 22). Thus, as the law existed for the years at issue here, the New York City refund of UBT for stock transfer tax paid was includable as income for the purposes of State UBT.

Section 705(c)(6) was amended in 1986 to allow an exclusion from New York State income for that portion of any City UBT refund attributable to stock transfer tax paid by securities dealers trading on their own account. This amendment was effective July 21, 1986 and made applicable to taxable years commencing on or after August 1, 1977 (L 1986, ch 444 § 4).

Petitioner argues that it should be allowed the same treatment of the New York City UBT refund for its taxable year commencing on January 1, 1977. It maintains that the Legislature intended to allow the exclusion for all years but was unaware of the existence of any taxpayers with an open claim for the years commencing before July 31, 1977.

The language of chapter 444 of the Laws of 1986 is clear and unambiguous and expresses the Legislature's intention that the amendment apply to tax years commencing on or after August 1, 1977. Where the words of a statute are free from ambiguity, there is no occasion to give effect to legislative intent through interpretation and construction of the statute (see, McKinney's Cons Laws of NY, Book 1, Statutes § 76).

D. Petitioner's remaining arguments are equally unpersuasive. "Unincorporated business gross income of an unincorporated business means the sum of the items of income and gain of the business, of whatever kind and in whatever form paid, includible in gross income for the taxable year for federal income tax purposes", with statutorily prescribed modifications (Tax Law § 705[a], [b] and [c]). Petitioner is correct in its assertion that before their amendment the effect of these modifications was to subject a New York City UBT refund to State UBT. However, petitioner has presented no authority to support its contention that the State was prohibited from including the City refund as income for purposes of the State UBT.

E. Petitioner presented no evidence with regard to the penalty asserted for the 1979 tax year; therefore, the penalty must be sustained.

F. The deficiencies asserted for the years 1979 and 1980 are canceled, and the deficiency for the year 1978 is reduced to \$7,069.75 plus interest.

G. The petition of Colin Hochstin Co. is granted to the extent indicated in Conclusion of Law "F"; the Notice of Deficiency issued on April 7, 1982 shall be modified accordingly; and in all other respects, the petition is denied.

DATED: Albany, New York
March 30, 1989

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE

